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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 RUDY RIVERA,

8 Plaintiff(s),

Case No. 2:17-CV-2776 JCM (NJK)

ORDER

9 v.

10 DANIEL BOGDEN, et al.,

11 Defendant(s).

12
13 Presently before the court is defendant Corrections Corporation of America's
14 ("CoreCivic") motion to dismiss. (ECF No. 13). Plaintiff Rudy Rivera filed a response (ECF No.
15 16), to which defendant replied (ECF No. 17).

16 **I. Facts**

17 This is a *Bivens* civil rights action arising from plaintiff's protracted pretrial detention.
18 (ECF No. 1); *see also Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388
19 (1971). Plaintiff alleges that on November 25, 2014, defendants Daniel Bogden and Amber Craig,
20 who are both federal prosecutors, filed an indictment charging plaintiff with marijuana-related
21 offenses. (ECF No. 3). On that same day, a Nevada federal court issued a warrant for plaintiff's
22 arrest. (*Id.*). On October 26, 2015, federal marshals in the Eastern District of California arrested
23 plaintiff and placed him into custody. (*Id.*). On October 27, a magistrate judge ordered plaintiff
24 to be detained pending transfer to the District of Nevada for his initial detention hearing. (*Id.*)

25 Plaintiff further alleges that he was transferred to the Nevada Southern Detention Center
26 ("NSDC") on or about November 4, 2015, where he remained in solitary confinement for the next
27 355 days. (*Id.*). During his detention, plaintiff repeatedly requested counsel and to be taken to a
28 judge, but CoreCivic ignored his requests. (*Id.*). After almost a year, plaintiff was able to send a

1 letter to the Federal Public Defender’s Office, which ultimately caused plaintiff to appear before a
2 magistrate judge on October 24, 2016. (*Id.*). The magistrate judge released plaintiff on a personal
3 recognizance bond. (*Id.*). On February 1, 2017, the Nevada federal court dismissed with prejudice
4 the charges against plaintiff. (*Id.*).

5 Plaintiff also alleges that his solitary confinement caused him to experience extreme
6 agitation and suffer severe anxiety for which he had to receive medical treatment. (*Id.*). Plaintiff
7 describes his symptoms as “extreme and severe fright, shock, fear, horror, and emotional distress.”
8 (*Id.*).

9 On November 3, 2017, plaintiff filed his first amended complaint. (ECF No. 3). The
10 amended complaint raises eight causes of action: (1) violation of the Fourth Amendment, (2)
11 violation of substantive due process under the Fifth Amendment, (3) violation of procedural due
12 process under the Fifth Amendment, (4) violation of the right to counsel and access to courts under
13 the Sixth Amendment, (5) negligence, (6) negligent infliction of emotional distress, (7) intentional
14 infliction of emotional distress, and (8) false imprisonment. (*Id.*). Plaintiff brings only the fifth,
15 sixth, seventh, and eighth causes of action against CoreCivic. (*Id.*).

16 Now, CoreCivic moves to dismiss the fifth, sixth, seventh, and eighth causes of action.
17 (ECF No. 13).

18 **II. Legal Standard**

19 The court may dismiss a plaintiff’s complaint for “failure to state a claim upon which relief
20 can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide “[a] short and
21 plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).
22 Although rule 8 does not require detailed factual allegations, it does require more than labels and
23 conclusions. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Furthermore, a formulaic
24 recitation of the elements of a cause of action will not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662,
25 677 (2009) (citation omitted). Rule 8 does not unlock the doors of discovery for a plaintiff armed
26 with nothing more than conclusions. *Id.* at 678–79.

27 To survive a motion to dismiss, a complaint must contain sufficient factual matter to “state
28 a claim to relief that is plausible on its face.” *Id.* A claim has facial plausibility when the plaintiff

1 pleads factual content that allows the court to draw the reasonable inference that the defendant is
2 liable for the misconduct alleged. *Id.* When a complaint pleads facts that are merely consistent
3 with a defendant's liability, and shows only a mere possibility of entitlement, the complaint does
4 not meet the requirements to show plausibility of entitlement to relief. *Id.*

5 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply
6 when considering a motion to dismiss. *Id.* First, the court must accept as true all of the allegations
7 contained in a complaint. However, this requirement is inapplicable to legal conclusions. *Id.*
8 Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.*
9 at 678. Where the complaint does not permit the court to infer more than the mere possibility of
10 misconduct, the complaint has "alleged – but not shown – that the pleader is entitled to relief." *Id.*
11 at 679. When the allegations in a complaint have not crossed the line from conceivable to
12 plausible, plaintiff's claim must be dismissed. *Twombly*, 550 U.S. at 570.

13 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202,
14 1216 (9th Cir. 2011). The *Starr* court held:

15 First, to be entitled to the presumption of truth, allegations in a complaint or
16 counterclaim may not simply recite the elements of a cause of action, but must
17 contain sufficient allegations of underlying facts to give fair notice and to enable
18 the opposing party to defend itself effectively. Second, the factual allegations that
are taken as true must plausibly suggest an entitlement to relief, such that it is not
unfair to require the opposing party to be subjected to the expense of discovery and
continued litigation.

19 *Id.*

20 **III. Discussion**

21 Defendant moves to dismiss four causes of action: negligence, negligent infliction of
22 emotional distress, intentional infliction of emotional distress, and false imprisonment. (ECF No.
23 13).

24 *a. Negligence*

25 To state a claim for negligence under Nevada law, a plaintiff must allege four elements:
26 (1) a duty of care, (2) a breach of that duty, (3) causation, and (4) damages. *Turner v. Mandalay*
27 *Sport Entm't*, 180 P.3d 1172, 1175 (Nev. 2008).

1 CoreCivic argues that the court should dismiss plaintiff's negligence claim because
2 plaintiff has failed to allege that CoreCivic's acts or omissions caused plaintiff's injuries. (ECF
3 No. 13). However, plaintiff alleges that CoreCivic and its employees placed plaintiff in detention,
4 did not give him access to counsel, and ignored his requests for an attorney or to be taken before
5 a judge. (ECF No. 3). Assuming these allegations to be true, CoreCivic's actions would have
6 foreseeably caused plaintiff's prolonged term of custody. Accordingly, the court will not dismiss
7 plaintiff's negligence claim.

8 *b. Negligent infliction of emotional distress*

9 Nevada law provides a "direct" theory of negligent infliction of emotional distress, where
10 victims of a defendant's negligent acts can recover damages for emotional distress. *See Shoen v.*
11 *Amerco, Inc.*, 896 P.2d 469, 477 (Nev. 1995). To state a claim for "direct" negligent infliction of
12 emotional distress, a plaintiff must allege: (1) the defendant acted negligently, (2) either a physical
13 impact or, in the absence of a physical impact, proof of a serious emotional distress causing
14 physical injury or illness, and (3) actual or proximate causation. *See Barmettler v. Reno Air, Inc.*,
15 956 P.2d 1382, 1387 (Nev. 1998). A plaintiff must further allege that "there was 'extreme and
16 outrageous conduct with either the intention of, or reckless disregard for, causing emotional
17 distress.'" *State of Eighth Judicial Dist. Court ex rel. v. Cty. of Clark*, 42 P.3d 233, 241 (Nev.
18 2002) (quoting *Shoen*, 896 P.2d at 477).

19 CoreCivic argues that the court should dismiss plaintiff's negligent infliction of emotional
20 distress claim for two reasons: (1) plaintiff did not sufficiently allege that CoreCivic caused
21 plaintiff's injuries, and (2) plaintiff did not allege a physical injury. (ECF No. 13).

22 The court has already addressed the issue of causation and found that plaintiff has made
23 sufficient allegations. However, plaintiff has failed to allege a physical injury. The complaint
24 contains only allegations of psychological symptoms. In order to properly state a claim, plaintiff
25 would have to allege that CoreCivic's actions or his psychological symptoms caused a physical
26 injury. Accordingly, the court will dismiss plaintiff's negligent infliction of emotional distress
27 claim without prejudice.

28 . . .

1 c. *Intentional infliction of emotional distress*

2 To state a claim for intentional infliction of emotional distress under Nevada law, a plaintiff
3 must allege: (1) that the defendant's conduct was extreme and outrageous; (2) that the defendant
4 either intended or recklessly disregarded the causing of emotional distress; (3) that the plaintiff
5 actually suffered severe or extreme emotional distress; and (4) that the defendant's conduct actually
6 or proximately caused the distress. *Olivero v. Lowe*, 995 P.2d 1023, 1025 (Nev. 2000). “[E]xtreme
7 and outrageous conduct is that which is outside all possible bounds of decency and is regarded as
8 utterly intolerable in a civilized community.” *Maduike v. Agency Rent-A-Car*, 953 P.2d 24, 26
9 (Nev. 1998) (quotation omitted).

10 CoreCivic argues that the court should dismiss plaintiff’s intentional infliction of emotional
11 distress claim for five reasons: (1) plaintiff did not sufficiently allege that CoreCivic caused
12 plaintiff’s injuries, (2) plaintiff did not allege details of extreme and outrageous conduct, (3)
13 plaintiff did not allege intent or reckless disregard of the probability that CoreCivic’s conduct
14 would cause emotional distress, (4) plaintiff did not allege that he suffered from severe emotional
15 distress, and (5) plaintiff did not allege a physical injury. (ECF No. 13).

16 The court has already addressed the issue of causation and found that plaintiff has made
17 sufficient allegations. Further, plaintiff has sufficiently pleaded extreme and outrageous conduct
18 by alleging that CoreCivic participated in placing plaintiff in solitary confinement and leaving him
19 there for nearly a year—something akin to being locked up and forgotten.

20 Plaintiff has also sufficiently alleged intent or reckless disregard. The complaint includes
21 alleged details that plaintiff made multiple requests to CoreCivic and its employees to be appointed
22 counsel and be taken before a judge. (ECF No. 3). Such requests would have put CoreCivic on
23 notice that plaintiff did not have counsel, which was necessary to permit adjudication of the
24 charges against him and allow a timely release from solitary confinement.

25 As to whether plaintiff has pleaded emotional distress, the complaint details plaintiff’s
26 symptoms as “extreme and severe fright, shock, fear, horror, and emotional distress.” (ECF No.
27 3). These allegations, if true, are sufficient to allow the court to draw a reasonable inference that
28 plaintiff suffered severe emotional distress.

1 Finally, CoreCivic is mistaken when it argues that that plaintiff must allege a physical
2 injury. Intentional infliction of emotional distress does not require a showing of physical injury
3 when a plaintiff has suffered severe emotional distress. *See, e.g., Franchise Tax Bd. of Cal. v.*
4 *Hyatt*, 335 P.3d 125, 148 (Nev. 2014) (“if the enormity of the outrage carries conviction that there
5 has in fact been severe emotional distress, bodily harm is not required”). Here, plaintiff has alleged
6 severe emotional distress. Assuming these allegations to be true, as required when considering a
7 motion to dismiss, entails that plaintiff would not need to show physical injury.

8 Accordingly, the court will not dismiss plaintiff’s intentional infliction of emotional
9 distress claim.

10 *d. False imprisonment*

11 Under Nevada law, false imprisonment is the “unlawful violation of the personal liberty of
12 another, and consists in confinement or detention without sufficient legal authority.” Nev. Rev.
13 Stat. § 200.460. To establish a claim of false imprisonment, “it is necessary to prove that the
14 plaintiff was restrained of his or her liberty under probable imminence of force without any legal
15 cause or justification.” *Garton v. City of Reno*, 720 P.2d 1227, 1228 (Nev. 1986) (brackets
16 omitted). An individual’s “submission to the mere verbal direction of another, unaccompanied by
17 force or threats of any character, does not constitute false imprisonment.” *Lerner Shops of Nevada,*
18 *Inc. v. Marin*, 423 P.2d 398, 400 (Nev.1967).

19 An arrest or imprisonment pursuant to a valid legal process is generally not actionable
20 under false imprisonment. *Nelson v. Cty. of Las Vegas*, 655 P.2d 1141, 1143–44 (Nev. 1983).
21 However, imprisonment following a valid arrest becomes actionable when an officer “fails to take
22 the arrested person before a court or magistrate within a reasonable time or without unnecessary
23 delay.” *Id.* at 1144–45. When an otherwise lawful detention is unreasonable, only the officers
24 that participate in the detention, and their principals or employers, are liable for false
25 imprisonment. *Id.* at 1145.

26 CoreCivic argues that the court should dismiss plaintiff’s negligent infliction of emotional
27 distress claim for two reasons: (1) plaintiff did not sufficiently allege that CoreCivic caused
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1 plaintiff's injuries, and (2) plaintiff alleged that CoreCivic incarcerated plaintiff with proper legal
2 cause. (ECF No. 13).

3 The court has already addressed the issue of causation and found that plaintiff has made
4 sufficient allegations. As to CoreCivic's second argument, CoreCivic initially imprisoned plaintiff
5 with sufficient legal cause, as supported by the alleged Oct 27, 2015, order. *See* (ECF No. 3).
6 However, the analysis does not end there. The crux of the court's inquiry is whether CoreCivic or
7 its employees brought plaintiff before a judge within reasonable time. *See Nelson*, 655 P.2d at
8 1144-45.

9 Plaintiff alleges that he was kept in solitary confinement for 355 days, despite repeatedly
10 asking for help. (ECF No. 3). This alleged 355-day imprisonment, which CoreCivic does not
11 dispute, for a charge that was dismissed with prejudice would constitute a failure to bring plaintiff
12 before a judge within reasonable time. These allegations, if proven to be true, would render
13 plaintiff's confinement unlawful. Accordingly, the court will not dismiss plaintiff's claim for false
14 imprisonment.

15 **IV. Conclusion**

16 Accordingly,

17 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant's motion to
18 dismiss (ECF No. 13) be, and the same hereby is, GRANTED in part and DENIED in part,
19 consistent with the foregoing.

20 DATED September 6, 2018.

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UNITED STATES DISTRICT JUDGE
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